

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEGALE EXCEL KNOLTON,

Defendant-Appellant.

UNPUBLISHED

March 11, 2003

No. 237796

Wayne Circuit Court

LC Nos. 00-012530-01;

01-003217-01

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In LC No. 00-012530-01, defendant Legale Excel Knolton was convicted, following a bench trial, of possession of marijuana¹ and carrying a concealed weapon (CCW).²³ In LC No. 01-003217-01, Knolton was convicted, following a separate bench trial, of possession of less than twenty-five grams of cocaine⁴ and possession of a firearm during the commission of a felony.⁵ The trial court sentenced Knolton to concurrent prison terms of nine months for the possession of marijuana conviction, fifteen months to five years for the CCW conviction, fourteen months to four years for the possession of cocaine conviction, and a consecutive two-year term for the felony-firearm conviction. Knolton appeals as of right. We affirm the convictions and the sentences for possession of marijuana and felony-firearm, but vacate the sentences for CCW and possession of less than twenty-five grams of cocaine and remand for resentencing with respect to those offenses only.

I. Basic Facts And Procedural History

On the evening of October 9, 2000, a narcotics crew executed a search warrant at a vacant home in Detroit. Officer Heshimu Green testified that he knocked and announced the

¹ MCL 333.7403(2)(d).

² MCL 750.227.

³ Defendant was originally charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), CCW, and felony-firearm.

⁴ MCL 333.7403(2)(a)(v).

⁵ MCL 750.227b.

officers' presence, and after hearing footsteps, the officers then entered by force. As Officer Randall Miller entered the house, he heard glass breaking and running coming from the rear of the house. Green then saw someone jump through a glass window in a rear bedroom. In the same bedroom, the officers discovered Knolton crouched down in a closet. Green asked Knolton to come out of the closet, but he refused to do so. Green then pulled Knolton out of the closet as he resisted. When Green handcuffed Knolton, he discovered a loaded nine-millimeter automatic pistol in Knolton's back waistband, underneath his shirt. Green announced the weapon discovery to the other officers and turned Knolton over to Miller.

Miller searched Knolton and found two bags of marijuana in his pants pockets. One bag contained fifteen individually packaged ziplock bags of marijuana, and the second bag contained twenty-three individually packaged ziplock bags of marijuana. The parties stipulated that the substance in the bags was marijuana. Miller testified that, based on his experience as a narcotics officer, the marijuana was packaged for sale.

Knolton told the police he was at the house because he was visiting a friend. He stated that he had taken the gun from a table before he hid in the closet. Because the officer who took his statement was unaware of the narcotics confiscation, he did not ask Knolton about the marijuana. Based on this evidence, the trial court convicted Knolton of possession of marijuana and CCW after a bench trial on June 7, 2001.

On June 29, 2001, the trial court held a separate bench trial for an unrelated case stemming from Knolton's activities on the evening of February 27, 2001. On that night, Officer Katrina Barker and her partner were performing a robbery surveillance operation in Detroit. The officers were wearing civilian clothes and driving an unmarked car. Barker testified that, at one point, she heard gunshots and then saw a black male, wearing dark clothing, run into a liquor store. The officers called for a uniformed backup unit, which arrived in approximately one minute. The officers then went into the store, and identified Knolton as the man they had seen running after the shots were fired. Knolton told the officers that the gun was in his right jacket pocket. Barker then removed a loaded twenty-two caliber automatic handgun from Knolton's pocket, as well as a box of bullets. Knolton was then arrested and searched. The officers discovered a clear plastic baggy containing one rock of cocaine in the front, lower right pocket of Knolton's carpenter-style jeans. The parties stipulated that the substance confiscated from Knolton's pocket was .13 grams of a material containing cocaine.

In a statement made to the police, Knolton admitted owning the gun, and indicated that he had recently purchased it for protection and had shot the gun to "test[] it out." However, Knolton denied any knowledge of the cocaine found in the pants he was wearing. He claimed he was unaware of the contents of the lower pants pocket because the pants did not belong to him. After a bench trial, the court convicted Knolton of possession of less than twenty-five grams of cocaine and felony-firearm.

II. Sufficiency Of The Evidence

A. Standard Of Review

Knolton argues that the evidence was insufficient to support his convictions in each case.⁶ To ascertain whether sufficient evidence was presented at trial to support a conviction, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.⁷

B. CCW And Possession Of Marijuana

A conviction for CCW requires proof that (1) the defendant knowingly carried a pistol and (2) the pistol was concealed on or about the person of the defendant.⁸ A handgun is considered concealed if persons who come into ordinary contact with the accused cannot easily see it.⁹

To sustain a conviction for possession of marijuana, the prosecution is required to show that (1) the defendant possessed a controlled substance, (2) the substance possessed was marijuana, and (3) the defendant knew he was possessing marijuana.¹⁰ Possession of a controlled substance may be either actual or constructive.¹¹ Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.¹² The essential question in making this determination is “whether the defendant had dominion or control over the controlled substance.”¹³ Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession.¹⁴

Viewed in a light most favorable to the prosecution, there was sufficient evidence from which a jury could infer the necessary elements of CCW and possession of marijuana. There was evidence that, while executing a search warrant at a vacant house, police officers discovered Knolton in a closet from which he refused to emerge voluntarily. When the officer pulled Knolton out of the closet, the officer discovered a loaded pistol in Knolton’s back waistband, underneath his shirt. Knolton admitted that he had the gun while he was in the closet. This established the elements of CCW. Knolton’s claim that he only momentarily picked up the gun

⁶ In each case, the trial court summarily denied defendant’s motions for directed verdicts.

⁷ *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

⁸ *People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987); CJI2d 11.1.

⁹ *People v Kincade*, 61 Mich App 498, 504; 233 NW2d 54 (1975); CJI2d 11.1.

¹⁰ MCL 333.7403(2)(d); see also CJI2d 12.5.

¹¹ *Wolfe*, *supra* at 519-520.

¹² *Wolfe*, *supra* at 520; *People v Vaughn*, 200 Mich App 32, 36; 504 NW2d 2 (1993).

¹³ *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

¹⁴ *People v Fetterly*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

before hiding in the closet is inconsequential, and does not negate the fact that he knowingly possessed a concealed weapon.¹⁵

During the subsequent search, an officer confiscated two bags from Knolton's pants pocket, containing a total of thirty-eight individually packaged ziplock bags of marijuana. Knolton did not dispute that the substance recovered was marijuana. Knolton claims that the evidence was insufficient to establish his possession of the marijuana in light of what he characterizes as "inconsistencies" in certain witnesses' testimony. Specifically, Knolton points out that Miller heard footsteps in the house before announcing the officers' presence while Green did not, and Green's pat-down did not uncover drugs but Miller's pat-down did. Contrary to Knolton's characterization, these examples appear simply to be statements of two different people's perceptions and actions rather than inconsistent testimony that would cast doubt on the witnesses' veracity. Regardless, we will not interfere with the trier of fact's evaluation respecting the credibility of the witnesses.¹⁶ Furthermore, we resolve all conflicts in the evidence in favor of the prosecution.¹⁷ The evidence, viewed in a light most favorable to the prosecution, was sufficient to sustain Knolton's convictions for possession of marijuana and CCW.

C. Possession of Cocaine and Felony-Firearm

To sustain a conviction for the crime of unlawful possession of less than twenty-five grams of cocaine, the prosecution must show that (1) the defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that weighed less than twenty-five grams.¹⁸ To establish the elements of felony-firearm, the prosecution must prove that defendant (1) possessed a firearm and (2) that he possessed the firearm during the time he was committing or attempting to commit a felony.¹⁹ In this case, the underlying felony was possession of less than twenty-five grams of cocaine. Thus, the prosecution had to prove that Knolton possessed the firearm while he possessed the cocaine.²⁰

The evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to infer all the necessary elements of possession of less than twenty-five grams of cocaine and felony-firearm. Evidence showed that police officers heard gunshots coming from a certain area and then observed a black male in dark clothing run into a liquor store. After backup arrived approximately one minute later, the officers went into the store and identified Knolton as the man they had seen running after the shots were fired. Knolton told the officers where the gun was, and an officer then removed a loaded automatic handgun and a box

¹⁵ *Combs*, *supra* at 673.

¹⁶ *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

¹⁷ *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

¹⁸ MCL 333.7403(2)(a)(v); see also CJI2d 12.5.

¹⁹ MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

²⁰ See *Burgenmeyer*, *supra* at 439.

of ammunition from defendant's right jacket pocket. Knolton admitted that he owned the gun. During a subsequent search, the officers discovered a clear plastic baggy containing one rock of cocaine in the front, lower right pocket of Knolton's pants. It was undisputed that the substance was .13 grams of cocaine.

Knolton argues that this evidence was insufficient to establish his knowing possession of the cocaine because the pants he was wearing did not belong to him. However, the trial court, as the trier of fact, was entitled to weigh the evidence and conclude that Knolton's assertion that he was not the owner of the controlled substance was not worthy of belief.²¹ Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain Knolton's convictions for possession of less than twenty-five grams of cocaine and felony-firearm.

III. Sentencing

Knolton's final claim is that he is entitled to resentencing because his sentences for CCW and possession of less than twenty-five grams of marijuana are impermissibly excessive.²² Because defendant committed the offenses after January 1999, the legislative sentencing guidelines apply.²³

A. Standard Of Review

Although the standard of review for sentencing issues under the legislative sentencing guidelines is somewhat unclear, the Supreme Court's language in *People v Hegwood* suggests that we review the amount a trial court departs from the guidelines for an abuse of discretion.²⁴

B. Analysis

Under the sentencing guidelines statute, the trial court, in most instances, must impose a minimum sentence in accordance with the calculated guidelines range.²⁵ A court may depart from the appropriate sentence range if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure."²⁶ Additionally, if the court departs

²¹ *Mehall, supra* at 6.

²² At first glance, it is difficult to discern from defendant's brief which sentences he is challenging. However, based on certain statements, it appears that he is challenging his sentences for CCW and possession of less than twenty-five grams of cocaine. Defendant acknowledges that the court was mandated to sentence him to a two-year term for the felony-firearm conviction. Also, in the discussion of the sentencing issue, he refers only to "felony convictions" and, thus, it appears that he is not challenging his misdemeanor conviction for possession of marijuana.

²³ MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

²⁴ *People v Hegwood*, 465 Mich 432, 437, n 10; 636 NW2d 127 (2001).

²⁵ MCL 769.34(2); *People v Babcock (After Remand)*, 250 Mich App 463, 465; 648 NW2d 221 (2002).

²⁶ MCL 769.34(3); *Hegwood, supra* at 439.

upward from the sentencing guidelines range, it must inform the defendant orally and in writing that he may appeal the sentence on the basis of the departure.²⁷

According to the Sentencing Information Reports, the applicable sentencing guidelines range was zero to three months for the CCW conviction and zero to eleven months for the possession of cocaine conviction. The court sentenced defendant to minimum terms of fifteen months for the CCW conviction, and fourteen months for the possession conviction. However, during the sentencing hearing, the trial court did not articulate substantial and compelling reasons for its upward departures, and failed to even acknowledge the applicable guidelines or that it was departing from the guidelines range.²⁸ The prosecutor concedes that the court failed to indicate on the record that it was departing from the guidelines ranges and failed to articulate any substantial reasons for doing so. In addition, we note that the trial court failed to advise defendant that he may appeal his sentences on the basis of the court's upward departures.²⁹ Accordingly, we vacate defendant's sentences for CCW and possession of cocaine and remand for resentencing with respect to those offenses only.³⁰ On remand, the trial court may impose any minimum sentence within the appropriate guidelines ranges or depart from those ranges if there are substantial and compelling reasons to do so and such reasons are stated on the record.³¹

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

²⁷ MCL 769.34(7); MCR 6.425(E)(4).

²⁸ It appears that the trial court was not aware that it was departing from the sentencing guidelines ranges. Apart from the trial court's failure to acknowledge the departure on the record, the trial court indicated on the SIRs that the imposed sentences did not constitute departures from the guidelines.

²⁹ MCL 769.34(7).

³⁰ MCL 769.34(11); *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2002).

³¹ MCL 769.34(3); *Hegwood*, *supra* at 439.